Supreme Court of the United States

OCTOBER TERM, 1948.

No. 30.

LELORD KORDEL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF.

LELORD KORDEL,
Appellant,

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CITATIONS

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I.

In the case at bar the Government has relied, to a considerable extent, upon its argument made in its brief filed in No. 13, *United States* v. *Urbeteit.* It may be necessary, therefore, to emphasize certain differences existing between the two cases.

In the first instance, this is a criminal appeal; the *Urbeteit* case involves only a civil proceeding, that of seizure on libel for condemnation. Since, in such a case, the district court acquires jurisdiction by the presence of the property within the district (*United States* v. *Spraul,* 185 Fed. 405; *United States* v. *2 Barrels of Desiccated Eggs,* 185 Fed. 302; *United States* v. *100 Barrels of Vinegar,* 188 Fed. 471; *United States* v. *94 Dozen, etc., Capon Springs Water,* 48 F. 2d 378, 30 F. 2d 300), it is relatively simple to determine whether or not specified printed

matter "accompanies" the drug.[1] In a criminal prosecution, however, this essential nexus must be affirmatively and factually proved *beyond a reasonable doubt*—a degree of proof clearly unpalatable to the trial court herein.

Again, in its *Urbeteit* brief (p. 13), the Government argues:

> "The Government submits that a leaflet which (a) explains the uses to be made of a device, (b) is sent in interstate commerce by the same shipper to the same consignee, and (c) is displayed with and is intended to be distributed with the device, 'accompanies' the device * * *."

If this be the appellee's position, it has conceded defeat in this case. For the admitted facts show that this appellant (1) fully and honestly labeled each product with *all* information *required by the Congress and the Federal Security Administrator,* giving whatever data necessary fully to inform purchasers as to its value, use, and purposes,[2] (2) did not send the goods and the printed matter under question *to the same consignee, i.e.,* to the consumer, but rather to an intermediate point, so to speak: a dealer—and, of course, at far divergent times; and (3) did not display or authorize their display together with the goods nor

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[1] This is obviously a fatal weakness of the Government's case in the *Urbeteit* case, the district court never having acquired jurisdiction of the advertising material.

[2] The vitamins and minerals, for example, were labeled in full accord with the requirements of the Special Dietary Regulations to sec. 403(j). Cf. *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218. Laxative preparations carried "adequate" directions for use in compliance with sec. 502(f). It is well-known that the Act was designed to require manufacturers "to disclose affirmatively *all* pertinent information relating to" the product. Herrick, *Food Regulation and Compliance,* Vol. 1, p. 98. This appellant obviously did *on the labels annexed to the goods.* Otherwise the informations would have alleged misbranding of the labels also; they do not. Cf. R. 462.

intend them to be distributed with the product.[3] Patently, no clear straight line can be drawn from the appellant to a particular consumer, as in the *Urbeteit* case. Instead the nexus is so tortuous and involved and fortuitous as to negate such an assumption. In each instance, moreover, the ultimate recipients of the article and of the printed matter could not be identified as the same person. The Government's attempts to show a connection rest on the flimsy accident that both goods and printed matter, at one time or another, accidentally passed through the hands of a dealer.

Finally, of course, the case at bar presents several important constitutional questions not involved in the *Urbeteit* appeal.

II.

In the final analysis, the answer to the question of whether or not "labeling" is confined to the package in a physical sense rests on the intent of the Congress in enacting this legislation. *United States* v. *Sullivan*, 332 U. S. 689, *United States* v. *Raynor*, 302 U. S. 540. In determining this intent, the Government is forced to fall back on the statement made by Walter G. Campbell, then Chief of the Food and Drug Administration, at the Hearings Before a Subcommittee of the Committee on Commerce, United States Senate, 73rd Congress, 2nd Sess., on S. 1944, p. 16 (See *Urbeteit* brief, p. 20). On this statement, the Government makes the unsupported assumption:

> "Clearly, therefore, the 1938 Act made the concept of 'labeling' more comprehensive than that which existed under the earlier law, * * *"

[3] The wide differences in shipping dates, ranging up to two years, the imprinting of a postal insignia for mailing purposes, the selling price placed on three books—all mitigate against an intention that they were to be distributed with the products.

This conclusion obviously distorts Mr. Campbell's testimony. In fact, the witness *confirmed* that "label" and "labeling" under the new law *duplicate* their significance under the 1906 statute! Thus, he testified:

> "*At the present time the law has control over those statements that are attached to or that accompany the package in the form of circulars.* For the purposes of the subsequent requirements of this bill *these* have been divided into two classes; first, 'label' meaning the principal label or labels *upon the immediate container* of any food, drug, or cosmetic, and *upon the outside container or wrapper*, if any there be, of the retail package of any food, drug, or cosmetic. *Then* the term 'labeling' is defined so as to include not only the label but all circulars and material and placards for display purposes and the like that may in any form whatever accompany the article of food, drug, or cosmetics." (Italics supplied.)

Actually, what the Government has overlooked is that at the time Mr. Campbell so testified there was no reason to press for an expansion of the labeling definition—*the draft of the bill before the Congress expressly embraced control over advertising!* (S. 1944, sec. 2(j).) Nor, when the advertising provision was deleted by Congress, in the final measure passed, could an attempt be made to expand the definition of labeling *in the face of express Congressional unwillingness and opposition to the granting of jurisdiction over this field to the Food and Drug Administration.*

It is clear and impossible of contradiction, therefore, that the definition of "label" and "labeling" merely continued the meaning expressed in *Seven Cases* v. *United States*, 239 U. S. 510, being confined to printed matter *in the package*, broken down to two portions merely to sim-

plify the statements of labeling requirements. See Senate Report No. 361, to accompany S. 5, 74th Cong., 1st Sess. p. 4, cited appellant's brief, p. 19.

The Government, incidentally, questions appellant's contention that the drafters of the present Act adopted the phraseology "accompanying such article" from the *Seven Cases* decision, with the intention that it carry the same significance. Mr. Campbell, in his testimony at the Hearings cited, confirmed this adoption of "court-decision" phrases. He admitted, for example, that the definition of false or misleading labeling (S. 1944, sec. 6(a)) had taken the phrase "by ambiguity or inference creates a misleading impression" verbatim from a decision of this Court (evidently *United States* v. *95 Barrels, etc., Apple Cider Vinegar*, 265 U. S. 438). Here is his testimony on the point (pp. 70-1):

> "If I may explain briefly, Senator, our purpose in using that language was to employ the most explicit terms possible in writing the definition. That is made possible *by using the language of the Supreme Court* in interpreting the existing terms of the act defining misbranding. • • • Now, in interpreting the last four words [misleading in any particular] the Supreme Court has said in the decision to which I referred that deception may result from inference and ambiguity. • • • Our thought was that if the bill carries *in specific words the interpretation of that language, as expressed by the Supreme Court*, it will apprise manufacturers more completely of their responsibility." (Italics supplied.)

III.

The Government argues that to limit "labeling" to printed matter physically accompanying the article would in effect emasculate the statute. But for over a quarter-

of-a-century such was the law without materially vitiating statutory protection.

It is also interesting to observe that the same argument was presented to the Congress at the Hearings cited above. Mr. Campbell urged (p. 67):

> "The protection of the public against deception is a proper part of this legislation. If it cannot be extended to advertising, the purpose of the bill, and certainly its practical effects, will fall to the ground."

In the face of this plea, the Congress nevertheless struck from the measure finally enacted control over advertising, giving it instead to the Federal Trade Commission, who incidentally still enforces analogous provisions.

Respectfully submitted,

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Attorney for Appellant.

October 8, 1948.